IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 447 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and sd/-
MR.JUSTICE M.C.PATEL sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 No

ABDULHAMID GULABNABI

Versus

STATE OF GUJARAT

Appearance:

MR KG SHETH for Petitioner
Mr.S.T.Mehta,Addl.PUBLIC PROSECUTOR for Respondent No. 1
Mr.S.C.Patel, for Respondent No. 2

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

Date of decision: 20/01/98

and 21/01/98

ORAL JUDGEMENT (Per Soni,J.)

Appellant-original accused in Sessions Case No.315/88 has challenged the judgment and order of conviction under section 20(b)(ii) and under sec.29 of

the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS" for short), by the learned Additional Sessions Judge, Court No.9,Ahmedabad, on 30.6.1989. The learned Additional Sessions Judge by that judgment and order, has awarded sentence of rigorous imprisonment for ten years and a fine of rupees one lakh, in default to suffer further rigorous imprisonment for one year, for each offence. He has also ordered that the sentences awarded should run concurrently.

One Abdulhamidkhan Abdulmajidkhan Maulvi, Custom Inspector (P.W.1), received information that some persons were preparing tablets and balls of charas at the terrace of Aakunji's chawl, situated in Popatiavad, Dariapur, Ahmedabad between 9.00 a.m. and 11.00 a.m. every day. The information was received in the evening of 1.2.1988. He, therefore, to verify the correctness of the information, sent one Inspector,Mr.A.S.Saiyed, in company of the informant in the evening of that day to verify the place alleged in the information and they were asked to come in the office next day between 8.30 a.m. and 9.00 a.m. Before the informant was sent in company of Mr.A.S.Saiyed, P.W. had conveyed the information to his Superintendent, Mr.N.H.Pathak (P.W.2) and his Assistant Collector, Mr.H.K.Thakore. Accordingly, the said officers had conveyed information to other officers to remain present with necessary staff at Customs House at about 9.00 O' clock on next day, i.e. 2.2.1988. Superintendent and other officers of Paldi Division were also called and were asked to remain present. Said Officers are namely, Mr.G.S.Macwan (P.W.3) and others and they had gathered there at 9.00 a.m. on 2.2.1988. Panchas were called and thereafter in the company of the Panchas and other officers, they proceeded towards the place of information and reached the house of which the terrace was to be raided. On seeing the Customs Officers, the persons who were on terrace and busy in preparing charas tablets ran helter-skelter.Some of them ran away by jumping out from the terrace. However, the appellant (to be referred to as "accused") having put on lungi, fell down and was caught by Inspector, Shri Rathod (P.W.8). Inspector Shri Rathod (P.W.8) was helped by Inspector Shri Dave,(P.W.7.). Accused who had at that time three polythene bags in his hands; as other bags and certain materials for preparing small tablets or balls of charas and the weighing machines, were taken to the Customs Officer, as they found that the collection of people may not permit them to complete the seizure and other formalities. On reaching the Customs office, they found that the polythene bags in the hands of the accused

contained charas balls and tablets.

P.W.3, who is a Customs Superintendent and who had headed the raiding party, drew panchnama of the seizure of the articles and then the statement of the accused was also recorded. As it was found by the Customs Officers that the accused was limping while coming down from the terrace and may have some problem about his leg, he was sent to a bone-setter in Shahpur and necessary bandage was applied. In the evening, he was produced before the In-charge Metropolitan Magistrate, Ahmedabad, with production-report Exh.27. It will be relevant to state here that while remanding the accused to judicial custody on production of the accused, the learned Metropolitan Magistrate, had passed the following order:-

> "Accused Abdulhamid Gulamnabi Shaikh produced before me today at 9.25 p.m. No complaint of ill-treatment against Custom Officers. Hence taken into judicial custody and remanded till 12th of February,1988."

Thereafter, criminal complaint , being No.2468/88 was filed in Court of Chief Metropolitan Magistrate, Ahmedabad, on 26.4.1988 where it was ordered to hold inquiry under section 202 read with sec.208 of the Code of Criminal Procedure, 1973 ("Code" for short). Thereafter, on 3.8.1988, the learned Magistrate issued a non-bailable warrant against the accused for the offence punishable under section 20(b)(ii) of the NDPS Act. As it appeared that the case was exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the case to the Court of Sessions and the same came up for hearing before the learned Additional City Sessions Judge, Court No.9, Ahmedabad.

The learned Additional City Sessions Judge, Ahmedabad, framed charge, to which the accused pleaded not guilty and claimed to be tried.

Customs Department then led necessary evidence. Accused's statement under sec.313 of the Code was then recorded. Accused has not led any evidence in defence. Defence of the accused, in substance, appeared to be that the complaint is vitiated for non-compliance of mandatory

provisions of NDPS Act and also that he is not found in conscious possession of the narcotic substance. It is also his defence that his confession-statements are recorded after he was beaten in the department and therefore the said statements being recorded under threat, are not voluntary one and cannot be acted upon.

The learned Addl. Sessions Judge, after hearing the learned Advocates for the prosecution and the defence, found the accused guilty of the offence with which he was charged and awarded sentence referred hereinabove. This judgment and order is assailed in this appeal.

21.1.1998

Learned Advocate,Mr.K.G.Sheth, has challenged the order of conviction on the grounds,namely, (1) that the trial is vitiated, inasmuch as the mandatory requirement of section 50 of NDPS Act are not complied with, and (2) that the prosecution has failed to prove and establish the conscious possession of the narcotic substance by the accused. He has also contended that the evidence of prosecution witnesses which consist only of the officers of the Customs Department is the evidence of interested witnesses and should not have been accepted by the learned Addl. Sessions Judge. Mr.Sheth further contended that though two independent witnesses were available to the prosecution, yet one of them has not supported the prosecution and the other is not examined by the department. In view of this fact, the adverse inference must have been drawn against the department and the Court, therefore, erred in holding that the accused is found in possession of the narcotic substance.

Mr.S.C.Patel, learned Addl.Central Govt. Standing Counsel, for respondent No.2-Customs Department, contended that the officer who searched the person of the accused was a gazetted officer and therefore in view of the judgment of this Court in case of Dhanpal Singh Barun Singh Thakur & Ors. vs. State of Gujarat, reported in 1996(1) G.L.R. page 219, no further compliance was necessary under section 50 of the NDPS Act. Though section 50 of the NDPS Act is held to be a mandatory one in view of Balbir Singh's case (AIR 1994 SC 1872), yet it is not the right to elect the officer by the accused. It is the right of the officer carrying out search to get

the search of the person before the officer whoever is most conveniently available to him. Mr.Patel, therefore, contended that there is no substance in the contention that there is non-compliance of section 50 of NDPS Act, in this case. Mr.Patel further contended that it is not that the evidence of the department-personnel, in absence of independent evidence, is required to be rejected and ignored. If the evidence of the department-personnel is cogent, convincing and acceptable, there is nothing wrong to rely on the same and record the order of conviction. Mr.Patel further contended that in addition to the oral evidence of the departmental witnesses, there is an admission of the accused-appellant, which is admissible in evidence under law. In view of these facts, Mr.Patel contended that the appeal should be dismissed. Mr.S.T.Mehta, learned Addl. Public Prosecutor, supports the contention raised by the learned Addl. Central Govt. Standing Counsel, Mr.S.C.Patel.

We will first deal with the contention whether there is a non-compliance of section 50 of the NDPS Act in the instant case. It is not disputed that search of accused was carried out by Mr.Mecwan (P.W.3). It is also not disputed that Mr.Mecwan, who is Superintendent in the Central Excise Department, is a gazetted officer. In view of our judgment in D.B.Thakur's case (supra), this contention of Mr.Sheth is not more res integra. This Court (Coram:C.K.Thakkar and S.M.Soni,JJ.) in D.B.Thakur's case (supra) has held as under:-

"26.Mr.Keshwani, learned Counsel for the appellants, further contended that there is non-compliance of Sec.50 of NDPS Act. Section 50 of NDPS Act reads as under:-

"50.Conditions under which search of persons shall be conducted:-(1) When any officer duly authorised under Sec.42 is about to search any person under the provisions of Sec.41, Sec.42 or Sec.43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the Departments mentioned in Sec.42 of to the nearest Magistrate."

Sub-sec.(2) & (3) are not relevant for our purpose at this stage. Relying on this provision, Mr.Keshwani contended that in the instant case, P.W.7 has not asked either of the

accused as to whether they would like to be searched in presence of a gazetted officer or the nearest Magistrate. Sec.50 refers to search by officer duly authorised under Sec.42 of NDPS Act. As we have discussed earlier, the officers referred to in Sec.41(2) and 42(1) are different officers. It is required to be made clear that for the officers referred to in Sec.41(2), who are carrying out the search, provisions of Sec.50 are not attracted.P.W.7 himself is a gazetted officer. When a gazetted officer is carrying out the search and if a provision requires that he should enquire from the persons to be searched as to whether they would like to be searched in presence of gazetted officer as contended by Mr.Keshwani, in our opinion, is traversy of Sec.50(1). Section 50(1) contemplates faith in a gazetted officer or a Magistrate. If enquiring officer himself is a gazetted officer, can it be said that faith reposed in a gazetted officer referred to in Sec.50(1) is taken away. It is improper to say that a gazetted officer if he is carrying out the search becomes less trustworthy and is required to take the accused person to some another gazetted officer or a Magistrate. Section 50(1) makes it clear that said provisions are attracted when officer duly authorised under Sec.42 has to inquire from the accused to exercise his option to be searched in presence of a gazetted officer or a Magistrate. Section 42(1) makes it clear that the officers duly empowered thereunder are not necessarily gazetted officers. For the empowered officers referred to in Sec.41(2), provisions of Sec.50 are not attracted. Reason is that such empowered officers are exercising power of search, seizure under Sec.41(2) itself. No doubt, under Sec.41(3), they are entitled to exercise powers of search, seizure under Sec.42(1). Therefore, we do not find any substance in the contention raised by Mr.Keshwani that the search carried out by P.W.7 is in contravention of the provisions of Sec.50 of the Act."

In D.B.Thakur's case (supra), search was carried out by gazetted officer and the Court held as under:-

"....Sec.50 contemplates and imposes an

obligation on the officers duly authorised under Sec.42 to tell the accused person whether he would like to be searched in presence of gazetted officer of the Department mentioned in Sec.42 or the Magistrate. As discussed above, officers referred to in Secs.41 and 42 are different officers. They are not the same. Sec.50 is attracted in case of a search by an officer duly authorised under Sec.42. It is not attracted in search by officers under Sec.41. Question is whether this provision of Sec.50(1) is attracted in the case of officers carrying out search under Sec.41. The answer is supplied by Sec.50(3). It will be relevant to state that when an officer is authorised by warrant by a Magistrate, that officer is authorised by name by the Magistrate after application of mind on arrivingt at a conclusion that there is reason to believe that a person has committed an offence punishable under Chapter IV of NDPS Act. After having this reason in mind, the learned Magistrate authorises a particular person. So far as authorisation by an empowered officer of a gazetted rank is concerned, he also after having reason to believe the commission of an offence by a person either from a personal knowledge or information given by any person and taken down in writing, authorises his subordinate, who is superior in rank to peon, sepoy or a constable of the concerned Department. He authorises such a person knowing full well as to whom he is authorising and also knowing full well whether he will be able to perform his job. Keeping this aspect in mind, if such officers of Sec.41 are required to give an option to the person to be searched as to whether he would like to be searched in presence of a Magistrate or a gazetted officer, then it makes the said powers either of the Magistrate or the officer of the gazetted rank to authorise redundant one...."

Mr.K.G.Sheth, learned Advocate for the appellant-accused, has further contended that three polythene bags were found in the hand of accused and the question is whether section 50 of the NDPS Act is attracted in the instant case or not. We do not want to enter into the question whether search of the bags in the hand of the accused would amout to search of a person or not. In view of the judgment in D.B.Thakur's case (supra), even if it be the search of a person, then the same is to be carried out by a gazetted officer and not informing the accused of his right whether he would like to be searched in presence of a gazetted officer or a Magistrate would not vitiate the trial. Mr.Sheth relying on a judgment in the case of Babu Rao vs. State of

Karnataka, reported in 1993(1) CRIMES, page 865, contended that even if the officer, who is carrying out the search, is a gazetted officer, then also he is required to inform the accused of his right to be searched in presence of a gazetted officer or a Magistrate. In our opinion, that judgment will not apply to the facts of the present case. In case of Babu Rao (supra), search was not carried out by the gazetted officer, but the gazetted officer was simply present at the time of search and the Court has held that simply because the gazetted officer was present, his presence would not validate the search, unless the accused was informed. In the present case, the search was carried out by the gazetted officer and that fact is not disputed by either the defence or the prosecution. Therefore, in view of this fact, we do not find any favour with the contention that the trial is vitiated for non-compliance of sec.50 of the NDPS Act.

This brings us to appreciate the contention that prosecution has failed to prove conscious possession of the narcotic substance by the accused. Prosecution has relied on the following circumstances to establish possession of the accused:-

(1) Oral evidence of the prosecution witnesses.

(2) Admission of the accused.

(3) On establishment of these facts, failure of the accused to explain the possession thereof.

Abdul Hamidkhan Abdul Majidkhan Maulvi (P.W.1) has deposed to the effect that in the evening of 1.2.1988, he received an information from his informant that on the terrace of a house at the corner of Golwad in Popatiyavad area of Kalupur, Ahmedabad, certain persons are packing charas between 9.00 and 11.00 a.m. He got that information verified through Inspector Shri Saiyed in company of the informant and informed his superior officer to make necessary arrangement to raid that premises. On 2.8.1988, Superintendent Shri Mecwan (P.W.3) and other officers, namely, P.W.1, P.W.5, P.W.6, P.W.7 and P.W.8 in company of other officers went on the site and raided the premises when some persons on the terrace ran away. However, the accused was arrested. As the mob had gathered there after arrest, all the

materials from the terrace along with the accused with the contents in his hand, were brought to the Customs Office, where Panchnama was drawn, and after following necessary formalities, the same were seized.

Evidence of Shri Maulvi is challenged on the ground of improbabilities. It is suggested in his cross-examination that accused had entered the premises to serve tea and was arrested. Except this suggestion, there is no material brought on record whereby the say of witness Maulvi (P.W.1) can be rejected. Say of witness Maulvi (P.W.1) is substantially corroborated by evidence of Shri Ramanbhai Naranbhai Rathod (P.W.8). Shri Rathod (P.W.8) had joined the raiding party from the next day, i.e. 2.2.1988, as he was informed by his superior on the earlier day.According to this P.W.8, when he reached Dariapur Popatiyawad in the company of Shri Mecwan and Shri Saiyed (P.W.6),Shri Saiyed showed the ladder by which one can go to the terrace. The P.W.2 was ahead and was followed by Shri K.B.Dave (P.W.7), Shri Mecwan (P.W.3), Shri Joshi (P.W.5) and two panchas.When they reached the terrace, what he saw was that a man with three packets in his hand was trying to jump out the parapet. However, he was caught. He also saw three to four persons running away at a distance of three to four roofs.After the accused was caught, Shri Dave (P.W.7) came there and he also caught hold of him. As the person was trying to escape, Shri Dave helped in catching him. Thereafter, the Superintendent and other Inspectors and Panchas came there and on inquiry the person disclosed his name as Abdul Habib Gulamnabi. On inquiry as to what is there in the bags, he disclosed that it contains charas. Then other Inspectors also inquired under the shade of jute cloth and found that other articles were lying there. Substance from one of the bags in the hand of Abdul Habib was taken out and it was found to be containing charas by look and smell. Then they came down of terrace and the mob had gathered.It was explained to the Panchas that it is not wise to carry out the further procedure there, and they left for the Customs Office.This part of evidence of Shri Rathod (P.W.8) is further corroborated by evidence of P.W.3 Shri Mecwan, P.W.5 Shri Joshi, P.W.6 Shri Saiyed and P.W.7 Shri Dave. However, nothing has been made out in their cross-examination either to reject their evidence or not to accept the same. Thus, from the evidence of P.W.1, P.W.3, P.W.5, P.W.6,P.W.7 and P.W.8, it is established that from the terrace of the house, accused was caught with three polythene bags in his hand which contained charas.

Evidence of this witness is further corroborated by Superintendent Shri Pathak (P.W.2).Nothing has been found in the cross-examination of any of these witnesses which may create doubt to accept their evidence.

Thus, from the evidence of these witnesses it is proved by the prosecution that a substance was found from possession of the accused.

Mr.Mecwan and other officers have taken out sample from the said substance found from the possession of the accused and the same is sent to Forensic Science Laboratory.These officers were primarily of the view that substance is charas, but their say was corroborated by the evidence of Forensic Science Laboratory.When the said substance was sent to Forensic Sicence Laboratory, the opinion given by the Senior Scientific Assistant of Forensic Science Laboratory is that on analysis the exhibit contained botanical material of cannabis sativa, which is known as charas in colloquial language. Said report Exh.7 is admitted in evidence by the order of the learned Additional City Sessions Judge, in view of section 293 of the Code. No exception is taken by the defence to this order, nor is the same disputed in any manner before us. Thus, from the oral evidence of the Customs Personnel referred above, read with the report of the Forensic Science Laboratory, it is proved that cannabis sativa (charas) was possessed by the accused. The quantity found from possession of the accused was .870 kgs. in weight.

That charas was possessed by the accused is further proved by the prosecution from the admission of the accused before the Customs Officer. Under section 67 of the NDPS Act, Superintendent of Customs Shri N.H.Pathak (P.W.2) has recorded the statement of the accused. His further statement was also recorded on that very day by Shri Pathak (P.W.2). In his statement (Exh.13), the accused has admitted to the following effect:-

"That the premises No.2281, Kazi Maholla, Chandan Talwadi, Dariapur, Ahmedabad is of our ownership....It is a fact that the officers of your department caught hold of me with 870 grams

of charas of the value of Rs.3480/- from the terrace of our house situated in Akunji Chawl of Popatiyawad area, Dariapur, Ahmedabad City, which is of two storeys having 10 to 15 rooms, in the morning at about ten O' clock of 2.2.1988....Today, in the morning at about 9.00 a.m., one Saiyed Iqbal had brought charas of about one kilo weight. He had also brought knife, scales to weigh charas, weights to weigh the same and the polythene bags and the cloth bag with a packet of candle to prepare tablets of charas. I, Saiyed Iqbal Sayed Hussain,Rasid Abdul Rehman and Abdul Hasid Abdul Rahman were there to prepare the tablets and to pack the same. We had gone there on the terrace and had commenced our work. We had prepared tablets of charas of the value of about 130 grams. In the meantime, your officers in company of panchas have raided. My other companions have run away through the roofs of other houses with charas.However, I could not run away as I had put on lungi.....As I fell down, there was a sprain on my left leg. I fell down because of lungi having been entangled in my left leg...."

The ,question raisede by the learned Advocate Mr.Sheth is whether this statement is admissible in law. Now, it is settled law that the Customs Officers are not police officers. Supreme Court in the case of Raj Kumar Karwal v.Union of India and others, reported in AIR 1991 Supreme Court 45, has held in paras 10 and 21 as under:-

"10. The scheme of the Act clearly shows that the Central Government is charged with the duty to take such measures as it deems necessary or expedient for preventing and combating the abuse of narcotic drugs (Sec.2(xiv)) and psychotropic substances (Section 2(xxiii) and the menace of illicit traffic (Section 2(viiia) therein. As pointed out earlier Chapter IV defines the offences and prescribes the punishments for violating the provisions of the Act. We must immediately concede that the punishments prescribed for the various offences under the Act are very severe e.g. Sections 21 and 23 prescribes the punishment of rigorous imprisonment for a term which shall not be less than ten years but which may extent to twenty

years and shall also be liable to fine which shall not be less than one lakh rupees but which may extent to two lakh rupees. Section 29 which makes abetment an offence prescribes the punishment provided for the offence abetted while Section 30 prescribes the punishyment which is one half of the punishment and fine for the principal offence. In addition thereto certain presumptions, albet rebuttable, are permitted to be raised against the accused. Counsel for the appellants, therefore, argued that when such extensive powers are conferred on the officers appointed under the Act and the consequences are so drastic, it is desirable that the protection of Section 25, Evidence Act, should be extended to persons accused of the commission of any crime punishable under the Act. In this connection our attention was drawn to the observations of this Court in Balbir Singh v. State of Haryana, 1987(1) JT 210 :(AIR 1987 SC 1053) wherein it is emphasised that when drastic provisions are made by a statute the duty of care on the authorities investigating the crime under such law is greater and the investigation must not only be thorough but also of a very high order. We, therefore, agree that as Section 25 Evidence Act, engrafts a wholesome protection it must not be construed in a narrow and technical sense but must be understood in a broad and popular sense. But at the same time it cannot be construed in so wide a sense as to include persons on whom only some of the powers exercised by the police are conferred within the category of police officers. See State of Punjab v. Barkat Ram, (1962) S SCR 338 at p.347: (AIR 1962 SC 276 at p.280) and Raja Ram Jaiswal v. State of Bihar (1964) 2 SCR 752 at p.761: (AIR 1964 SC 828 at P.831). This view has been reiterated in subsequent cases also."

"21. For the offences under the Act, the investigation is entrusted to officers in whom powers of an officer-in-charge of a police station are vested by a notification issued under Section 53 of the Act by the concerned Government. Thus a special investigating agency is created to investigate the commission of offences under the Act. There is no doubt that the Act creates new offences, empowers officers of certain departments to effect arrest, search

and seizure, outlines the procedure therefor, provides for a special machinery to investigate these offences and provides for the constitution of Special Courts for the trial of offences under the Act, notwithstanding anything contained in the Code. But, argued learned counsel for the appellants, the officers empowers to investigate under Section 53 of the Act must of necessity follow the procedure for investigation under Chapter XII of the Code, since the Act does not lay down its own procedure for investigation. By virtue of Section 51 of the Act, the provisions of the Code would apply since there is no provision in the Act which runs counter to the provisions of the Code. It was said that since the term 'investigation' is not defined by the Act, the definition thereof found in Section 2(h) of the Code must be invoked in view of Section 2(xxix) of the Act which in terms states that words and expressions used in the Act but not defined will carry the meaning assigned to them, if defined in the Code. Section 2(h) of the Code, which defines 'investigation' by an inclusive definition means all proceedings under the Code for collection of evidence conducted by a police officer or by any person authorised by a Magistrate in this behalf. Under Section 4(2) of the Code all offences under any other law have to be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Code. However, according to Section 5, nothing contained in the Code shall unless otherwise provided, affect special or local law or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. The power to investigate is to be found in Chapter XII of the Code which begins with Section 154 and ends with Section 176. The scheme of this Chapter is that the law can be set in motion in regard to a cognizable offence on receipt of information, written or oral, by the officer-in-charge of a police station. Once such information is received and registered, Section 156 empowers any officer-in-charge of the police station to investigate the same without any magisterial order. The investigation which so commences must be concluded, without unnecessary delay, by the submission of a report under Section 173 of the Code to the concerned Magistrate in the prescribed form. Any person to

whom power to investigate under Chapter XII is conferred can be said to be a 'police officer', no matter by what name hs is called. The nomenclature is not important, the content of the power he exercises is the determinative factor. The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Sec.173 of the Code. That is why this Court has since the decision in Badku Joti Savant (AIR 1966 SC 1746) accepted the ratio that unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under Sec.173, he cannot be described to be a 'police officer' under S.25,Evidence Act. Counsel for the appellants, however, argued that since the Act does not prescribe the procedure for investigation, the officers invested with power under S.53 of the Act must necessarily resort to the procedure under Chapter XII of the Code which would require them to culimnate the investigation by submitting a report under S.173 of the Code. Attractive though the submission appears at first blush, it cannot stand close scrutiny. In the first place as pointed out earlier there is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under S.53 of the Act, all the powers of Chapter XII, including the power to submit a report under S.173 of the Code. But the issue is placed beyond the pale of doubt by sub-section (2) of S.36A of the Act which begins with a non obstante clause --notwithstanding anything contained in the Code--and proceeds to say in clause (d) as under:

"36-A(d): a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial."

This clause (a) of S.36A(1) makes it clear that

> if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the DRI, the Special Court would take cognizance of the offence upon a formal complaint made by Government. Needless to say that such a complaint would have to be under S.190 of the Code. This clause, in our view, clinches trhe matter. We must, therefore, negative the contention that an officer appointed under Sec.53 of the Act, other than a police officer is entitled to exercise 'all' the powers under Chapter XII of the Code, including the powers to submit a report or charge-sheet under S.173 of the Code. That being so, the case does not satisfy the ratio of Badku Joti Sevant and subsequent decisions referred to earlier."

There the Supreme Court has held that as the officers of the department have no power to submit report under section 173 of the Code, they are not "police officers" within the scope of sec.25 of the Evidence Act. Here, in the instant case, P.W.2 has filed private complaint. On the basis of the same, after preliminary inquiry, the learned Chief Metropolitan Magistrate committed the case to the Court of Sessions. P.W.2 has no power to submit nor he has submitted a report under section 173 of the Code. Thus, in view of the Supreme Court judgment, officers of the Customs Department, though are invested with powers of officer in charge of the administration under section 53 of the NDPS Act, yet they are not police officers, as contemplated under section 25 of the Evidence Act. Thus, the statement Exh.13 as well as Exh.10 is not hit by section 25 of the Evidence Act.

This brings us to the contention raised by Mr.Sheth that the said statement is recorded under threat and illtreatment as the accused was assaulted by the officers of the department. To substantiate this contention, Mr.Sheth contended that after this statement was recorded on 2.2.1988 after about 2.00 p.m., accused was taken to a bone setter as there was a sprain on his leg. It is the case of the learned Advocate for the accused that either he was assaulted on the terrace before being brought to the Customs Department or was assaulted at the department where he got injury on his leg and was required to be treated. It is suggested in the cross-examination of P.W.1 that when accused was brought down from the terrace, he was limping. It is not

disputed by the department that the accused was taken to a bone setter and he was given treatment and a bandage was applied. Question is whether this injury on the person of the accused was as a result of assault by the department-personnel or was by a fall in the terrace when accused tried to escape when the department-personnel raided on the terrace. If accused was assaulted by the personnel of the department, he had an opportunity to complain of the same, when he was produced before the Magistrate. When the accused was produced before the Magistrate before taking him into judicial custody, the learned Metropolitan Magistrate in charge has inquired from him as to whether he had any complaint against Custom Offricers of ill-treatment. At that point of time, accused was before the learned Metropolitan Magistrate and he has not complaint of any ill-treatment against the Customs Department. This statement before the Metropolitan Magistrate (Exh.27) read together with his statement before P.W.2 (Exh.13) makes it clear that he got an injury on his leg by fall when tried to escape from being arrested or caught, when a raid was carried out at the terrace. Thus, injury on the person of the accused has nothing to do with his statement. However, the department has got him treated by a bone-setter. Thus, we do not find any substance in the contention that the statement Exh.13 and/or Exh.10 was recorded under coercion and threat and is an involuntary one. In view of the provisions of section 67 of NDPS Act, when the statement is recorded, it is admissible in law and the learned Addl.City Sessions Judge has rightly acted upon the said statement as one of the circumstances to prove the possession of charas by the accused.

It is contended by Mr.Sheth that no independent witness, though available, is examined by the department. There is nothing in criminal law that non-examination of independent witness makes the evidence of the departmental witnesses either doubtful or unacceptable or inadmissible one. Department has examined P.W.4 as one of the Panchas. However, he has turned hostile. As one of the Panchas (P.W.4) turned hostile, Advocate for the department gave Purshis (Exh.18) to the effect that as one of the panchas has turned hostile, department does not examine other panch,Bakul. No objection is raised by the learned Advocate for the defence to this purshis. It is only endorsed by the learned Advocate to the effect "Seen". Defence has not made any grievance about the same, in particular to the statement that the Panch has turned hostile. In view of the facts stated in Purshis

(Exh.18) and the endorsement made thereon by the learned Advocate for the defence, question of drawing any inference does not arise, much less against the prosecution.

No other contentions are raised by the learned Advocate for the appellant-accused.

In view of the above facts, the appeal is liable to be dismissed, and is hereby dismissed.

Learned Advocate for the appellant-accused, Mr.K.G.Sheth, has put in very sincere and able efforts to help the Court and administration of justice. We, therefore, recommend that he be favoured with some special remuneration, in addition to the usual fees that may be paid to him by the Legal Aid Committee, where huge amount has been collected for the interest of the Bar.Copy of this part of the order be sent to the Legal Aid Committee.

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